

TAM:JJC:all

**UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

TERRANCE K. ALDEN,	:	CIVIL NO. 3:CV-05-1735
Plaintiff	:	
	:	
v.	:	(Kosik, J.)
	:	
JOSEPH V. SMITH, et al.	:	
Defendants	:	Filed Electronically

**BRIEF IN OPPOSITION TO PLAINTIFF’S MOTION FOR A
TEMPORARY RESTRAINING ORDER
AND PRELIMINARY INJUNCTION**

NOW COME Defendants, by and through their counsel, Thomas A. Marino, United States Attorney, and Jennifer J. Clark, Assistant U.S. Attorney, who submit this brief in opposition to Plaintiff’s Motion for Temporary Restraining Order and Preliminary Injunction. In support thereof, Defendants state the following:

I. Introduction

Plaintiff, Terrance K. Alden, is a federal prisoner incarcerated at the United States Penitentiary in Lewisburg, Pennsylvania (USP Lewisburg). Alden’s Complaint names as Defendants Joseph V. Smith, Warden of USP Lewisburg; and Cathy Ey,

Counselor. Because the United States Attorney's Office has not yet received authorization from the Department of Justice to represent the individual defendants, in light of the immediate nature of Alden's injunctive pleading, and because Alden seeks to have the BOP act in a particular manner regarding the allegations in his motion for a temporary restraining order and preliminary injunction, this response is submitted on behalf of the United States.¹

II. Procedural History

On or about August 25, 2005, Alden filed his Complaint pursuant to Bivens² and the Federal Tort Claims Act.³ Alden's complaint alleges that Defendants were negligent and deliberately indifferent to his serious medical needs when they placed him in a cell with a cellmate, allegedly disregarding a medical restriction housing

¹ Presently, Defendants are in the process of obtaining approval for representation by the United States Attorney's Office as set forth in 28 C.F.R. § 50.15, et seq. If and when representation is authorized by the Civil Division, the United States Attorney's Office may undertake a full and traditional attorney-client relationship with the employees and will prepare and submit an appropriate response to the Complaint on their behalf in a time and manner consistent with the Federal Rules of Civil Procedure.

² Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971).

³ Federal Tort Claims Act ("FTCA"), 28 U.S.C. §2671 et seq.

order. Alden also appears to complain about double-bunking in general, and alterations to prison cells which reduced the amount of floor space and caused prisoners to be exposed to lead-based paint dust. Also on August 25, 2005, Alden filed a motion for a temporary restraining order and preliminary injunction and a brief in support of his motion. Defendants were served by United States mail with the Complaint, as well as Alden's motion for a temporary restraining order and preliminary injunction and brief on September 9, 2005. The United States Attorney's Office was served on September 14, 2005.

Alden’s motion for a temporary restraining order and preliminary injunction seeks an order “restraining the defendants or their agents from destroying or modifying the medical records of the plaintiff. Additionally to restore the plaintiff to medically restricted quarters, as prescribed by physician treating a serious medical need. Further review the plaintiff’s condition for surgical repair via second opinion from outside doctor.” Doc. 5 at 3.

II. Statement of Facts

Dr. Anthony J. Bussanich is Clinical Director at USP Lewisburg. Ex.1 at 1. Dr. Bussanich reviewed Alden's medical records with regard to Alden's claim that he is currently suffering from panic attacks and sleep deprivation, and that he requires surgery to repair a tear in his abdominal wall. Id. at 1-2.

Contrary to Alden's assertions, he does **not** have a single cell assignment, nor is there any evidence that he has requested to be examined by Health Services personnel for such an assignment since his one-year single cell assignment expired. *Id.* at 6. Further, there is no evidence in Alden's medical records that he is suffering from "acute abdominal pain associated with a tear in the tissues of the abdominal wall," or that he has sought treatment for such an injury. *Id.*

Similarly, with the exception of complaints and treatment for lower back pain (November 2004), there is no evidence that Alden has sought assistance from Health Services staff for "severe muscle spasms deep back and chest inclusive of the heart" or severe "sleep deprivation." *Id.* Dr. Bussanich concludes that Alden has received appropriate medical care for his complaints, and Health Services staff are available at the institution to provide further treatment for Alden as requested and medically indicated. *Id.*

Dr. Lawrence S. Karpen is Chief of Psychology Services at USP Lewisburg. Ex.2 at 1. Dr. Karpen reviewed Alden's psychological records with regard the claims he raises in his motion for a preliminary injunction and temporary restraining order. *Id.* at 1-2. This review revealed that from May, 2001 to the present, Alden has neither requested nor demonstrated the need for psychological intervention, including

distress stemming from anxiety, depression or insomnia. Id. at 3. Alden has not been prescribed any medication for any mental health issues for over four years. Id.

Contrary to Alden's claims, there is no record that he has ever been diagnosed by psychology services staff as suffering from "post-traumatic stress disorder," nor have these staff members ever issued a single cell assignment slip to Alden. Id. Alden's assertion that he suffers from panic attacks only when he has a cell mate is inconsistent with the nature of a panic disorder. Id. An individual who suffers from a panic disorder is likely to have panic attacks at any time, often unexpectedly, including when alone. Id. at 3-4. In addition, panic attacks do not result in a loss of volition (free will) which would enable someone to commit a violent act without self-control. Id. at 4.

Dr. Karpen concludes that Alden has received appropriate mental health care for his complaints, and Psychology Services staff are available at the institution to provide further treatment for the Plaintiff as requested and medically indicated. Id.

III. Question Presented

Should the Motion for a temporary restraining order and preliminary injunction be dismissed because Alden is unable to satisfy the requisites for granting a preliminary injunction and temporary restraining order?

Suggested answer in the affirmative.

IV. Argument

Before the Court may issue a preliminary injunction, it must find that: (1) the plaintiff has made a strong showing that he is likely to prevail on the merits; (2) the plaintiff will be irreparably harmed unless the application is granted; (3) granting the injunction will not substantially harm other parties interested in the proceeding more than the plaintiff; and (4) granting the injunction will not adversely affect the public interest. See S & R Corp. v. Jiffy Lube Intern., Inc., 968 F.2d 371, 374 (3d Cir. 1992) (citing Hoxworth v. Blinder, Robinson & Co., Inc., 903 F.2d 186, 197-98 (3d Cir. 1990)); Instant Air Freight v. C.F. Air Freight, Inc., 882 F.2d 797, 800 (3d Cir. 1989); Northern Penna. Legal Services, Inc. v. County of Lackawanna, 513 F. Supp. 678, 681 (M.D. Pa., 1981)(Nealon, C.J.). If the plaintiff cannot establish each of the above-mentioned elements, a preliminary injunction may not issue. See e.g., Skehan v. Board of Trustees, 353 F. Supp. 542, 543 (M.D. Pa., 1973) (Muir, J.).

Additionally, because a preliminary injunction is an extraordinary equitable action, all of the equitable defenses apply. Cf. United States Steel Corp. v. Fraternal Assoc. of Steelhaulers, 431 F.2d 1046 (3rd Cir. 1970). Importantly, because a temporary restraining order is an extraordinary and drastic remedy, it should not be granted unless the plaintiff, by a clear showing, carries his heavy burden of persuading the Court on each of the above grounds and equities. See e.g., Wright &

Miller, Fed. Prac. & Proced. Civ. 2d § 2948 at 428-29 (1973). Furthermore, a preliminary injunction is generally only granted to preserve the status quo, not to alter the status quo. See Sovereign Order v. Messineo, 572 F. Supp. 983 (E.D. Pa. 1983)(Huyett, J.). See generally, Wright & Miller, supra, at §2948.

Defendants submit that Alden has not met his burden of satisfying, by a strong showing, the four-factor test set forth by the Third Circuit. Specifically, Alden fails to demonstrate that he will suffer any irreparable harm if the injunction is not granted, nor has he established that any harm outweighs any injury done to Defendants by the granting of the injunction. Indeed, Defendants have demonstrated that Alden is not currently being deprived of appropriate medical and psychological care and that he is not in need of the relief he seeks.

Alden also fails to provide any evidence that the public interest weighs in favor of granting his motion. Finally, Alden fails to make a strong showing that he will prevail on the merits of his claims. Alden simply reiterates several of the allegations in his Complaint.

Because Alden's requests for injunctive relief are the same as those listed in the Complaint, Defendants will be specifically addressing those requests in their impending dispositive motion and supporting brief. Because an answer or a dispositive motion has not yet been filed in this action, Alden's motion is premature.

The Court has not had an opportunity to consider any answer or dispositive motion which would raise applicable defenses such as respondeat superior, failure to state a claim and failure to exhaust available administrative remedies. Without having reached the merits of this action, the Court should not grant a preliminary injunction which would provide Alden the same relief he requests in his Complaint.

In sum, Alden fails to meet the requisite showing that would permit the Court to grant his motion for a temporary restraining order and preliminary injunction. In addition, Alden's motion is premature in that he requests the same relief requested in his Complaint, and the Court has not yet had an opportunity to consider any of the applicable defenses. Finally, Defendants have provided evidence to show that Alden is not being deprived of medical or psychological treatment and that there is no medical or psychological need for the relief he seeks in his motion. Accordingly, Alden's motion for a temporary restraining order and preliminary injunction should be denied.

V. Conclusion

For the reasons stated above, the motion for preliminary injunction and temporary restraining order should be denied.

Respectfully submitted,

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United States Attorney

/s Jennifer J. Clark
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Dated: September 29, 2005

**UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

TERRANCE K. ALDEN,	:	CIVIL NO. 3:CV-05-1735
Plaintiff	:	
	:	
v.	:	(Kosik, J.)
	:	
JOSEPH V. SMITH, et al.	:	
Defendants	:	Filed Electronically

CERTIFICATE OF SERVICE BY MAIL

The undersigned hereby certifies that she is an employee in the Office of the United States Attorney for the Middle District of Pennsylvania and is a person of such age and discretion as to be competent to serve papers.

That on September 29, 2005, she served a copy of the attached

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by placing said copy in a postpaid envelope addressed to the person hereinafter named, at the place and address stated below, which is the last known address, and by depositing said envelope and contents in the United States Mail at Harrisburg, Pennsylvania.

Addressee:

Terrence K. Alden
Reg. No. 02595-135
USP Lewisburg
PO Box 1000
Lewisburg PA 17837

s/ Anita L. Lightner
ANITA L. LIGHTNER
Paralegal Specialist

TAM:JJC:all

**UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

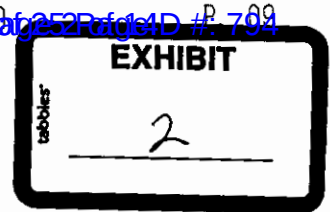
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**EXHIBITS TO BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION FOR
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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

TERRANCE K. ALDEN, :
Plaintiff : CIVIL ACTION NO. 3:CV-05-1735
v. : (JUDGE KOSIK)
JOSEPH V. SMITH, ET AL., :
Defendants :

DECLARATION OF LAWRENCE S. KARPEN, Ph.D.

I, LAWRENCE S. KARPEN, hereby declare and state as follows:

1. I am currently employed by the United States Department of Justice, Federal Bureau of Prisons ("FBOP"), as the Chief of Psychology Services at the United States Penitentiary, Lewisburg, Pennsylvania. I have been employed with the FBOP since June 1996.
2. The Plaintiff, inmate Terrance Alden, Federal Register Number 02595-135, is currently confined at the United States Penitentiary, Lewisburg, Pennsylvania 17837.
3. I am aware of the allegations contained in Alden's complaint and in his motion for a temporary restraining order and a preliminary injunction. Essentially, Alden states that he has a "medically restricted housing" slip; that he has since

been assigned a cell mate; that he is now suffering from panic attacks and sleep deprivation; and that he requires surgery to repair a tear in his abdominal wall.

4. As the Chief Psychologist, I have access to inmate psychology records and Bureau of Prisons SENTRY computer records.
5. In responding to this action, I have reviewed the Plaintiff's psychology records. This review reveals that the Plaintiff arrived at USP Lewisburg on September 1, 1999.
6. In November 1999, the Plaintiff was seen at his request by Psychology Services staff for individual psychotherapy and medication management (via telemedicine clinic) for diagnosis of panic disorder without agoraphobia (repetitive panic attacks) and a depressive disorder not otherwise specified ("NOS").
7. The case notes reflect that over the next year, the Plaintiff focused on achieving and maintaining single cell status and that apparently there were minimal active symptoms of distress reported during the period in which he was celled alone (single cell status). It was the conclusion of his treating psychologist that the Plaintiff's

difficulties were more a reflection of a personality disorder than that of a mental illness. Further, his treating psychologist determined that the Plaintiff was not in need of a single cell assignment for psychological reasons, but rather he wanted to create a more comfortable living situation while incarcerated.

8. Between May 2001 and the present, the Plaintiff has neither requested nor demonstrated the need for psychological intervention, including distress stemming from anxiety, depression or insomnia. Further, he has not been prescribed any medication for any mental health issues for over four years.
9. Contrary to the Plaintiff's claims, there is no record that the Plaintiff has ever been diagnosed by psychology services staff as suffering from "post-traumatic stress disorder", nor have these staff members ever issued a single cell assignment slip to the Plaintiff.
10. Further, the Plaintiff's assertions that he suffers from panic attacks only when he has a cell mate is inconsistent with the nature of a panic disorder. An individual who suffers from a panic disorder is likely to have panic attacks at any time, often unexpectedly, including when

alone. In addition, panic attacks do not result in a loss of volition (free will) which would enable someone to commit a violent act without self-control.

11. In conclusion, the Plaintiff has received appropriate mental health care for his complaints and Psychology Services staff are available at the institution to provide further treatment for the Plaintiff as requested and medically indicated.

I declare that the foregoing is true and correct and is
given under penalty of perjury pursuant to 28 U.S.C. § 1746.

Executed this 27th day of September 2005.



LAWRENCE S. KARPEN, Ph.D.
Chief Psychologist
U.S.P. Lewisburg
Lewisburg, Pennsylvania 17837



UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

TERRANCE K. ALDEN, :
Plaintiff : CIVIL ACTION NO. 3:CV-05-1735
v. : (JUDGE KOSIK)
JOSEPH V. SMITH, ET AL., :
Defendants :

DECLARATION OF ANTHONY J. BUSSANICH

I, Anthony J. Bussanich, hereby declare and state as follows:

1. I am currently employed by the United States Department of Justice, Federal Bureau of Prisons ("FBOP"), as the Clinical Director at the United States Penitentiary, Lewisburg, Pennsylvania. I have been employed with the FBOP since July 1998.
2. The Plaintiff, inmate Terrance Alden, Federal Register Number 02595-135, is currently confined at the United States Penitentiary, Lewisburg, Pennsylvania 17837.
3. I am aware of the allegations contained in Alden's complaint and in his motion for a temporary restraining order and a preliminary injunction. Essentially, Alden states that he

has a "medically restricted housing" slip; that he has since been assigned a cell mate; that he is now suffering from panic attacks and sleep deprivation; and that he requires surgery to repair a tear in his abdominal wall.

4. As the Clinical Director, I have access to inmate medical records and Bureau of Prisons SENTRY computer records.
5. In responding to this action, I have reviewed the Plaintiff's medical records. This review reveals that I examined the Plaintiff on December 2, 1999. On that date, the Plaintiff reported to Health Services complaining about "recurrent panic attacks" which were not controlled by Paxil. Since the Plaintiff was being treated by Psychology Services staff at that time, I directed that the Plaintiff be placed in a single cell status indefinitely and that he return to Health Services in one month to check his blood pressure.
6. I was then notified by Unit Management staff that due to population pressures within the institution, no single cells were available at that time. I therefore requested that the Plaintiff be placed on the waiting list for a single cell.
7. On December 17, 1999, the Plaintiff was evaluated by a

Physicians Assistant for palpitation (heart racing) and agitation. The Plaintiff was referred to Psychology Services staff.

8. On December 22, 1999, the Plaintiff reported to Health Services and stated that he was unable to sleep at night with recurrent panic attacks occurring approximately three times per month. I examined the Plaintiff and noted that his blood pressure was elevated and I diagnosed him as suffering from post-traumatic stress disorder and hypertension. I prescribed anti-hypertension medication, an indefinite single cell assignment, and I instructed the Plaintiff to return to Health Services in two weeks.
9. The Plaintiff was thereafter seen on various dates by Health Services staff for a variety of medical issues. To the best of my knowledge, the Plaintiff's single cell status which I issued in December 1999 remained in effect.
10. In January 2004, I conducted a review of the Plaintiff's single cell assignment status. This was done in accordance with a change in institution policy which required a review of all "indefinite" clinical orders. I then re-issued the Plaintiff's single cell assignment for a period of one year, after which time it would expire. The Plaintiff was

provided a copy of the slip.

11. On August 23, 2004, the Plaintiff refused to be seen for his regularly scheduled chronic care clinic review. He then agreed to be seen on August 31, 2004.
12. On December 10, 2004, the Plaintiff reported to Health Services staff complaining of back pain.
13. On December 14, 2004, the Plaintiff reported to Health Services staff complaining that he was suffering from "panic attacks" and was irritated. He also stated that his back pain was "much improved" and he refused his medication for high cholesterol. I examined the Plaintiff and I determined that he was not in any apparent distress, his blood pressure was slightly elevated, and his heart was not racing. I prescribed aspirin and I directed him to return to Health Services in two weeks so that I could check his blood pressure.
14. On January 31, 2005, the Plaintiff refused to be seen for his regularly scheduled chronic care clinic review.
15. There is no record that the Plaintiff returned to Health Services until April 12, 2005, at which time he complained

of low back pain. He further complained that he had a hernia and that he has had occasional panic attacks. Upon examination, the Plaintiff's blood pressure was improved but slightly elevated. There was no evidence of an abdominal hernia. I instructed the Plaintiff that he needed to control his blood pressure and high cholesterol level through medication. The Plaintiff continued to refuse hypertensive and cholesterol medication. He was also directed to return in four weeks to check his blood pressure. The Plaintiff failed to return to Health Services as directed.

16. On June 6, 2005, the Plaintiff was examined by a Physicians Assistant after he complained that he was doing "bad" and not sleeping. He also complained of pain in his feet and pain in his umbilical area. The Plaintiff refused all medication. No obvious abnormalities were noted and his blood pressure was controlled. There was no evidence of a hernia. The Physicians Assistant prescribed antibiotic and anti-fungal cream and powder for his feet, he ordered a laboratory test for the Plaintiff's cholesterol level, and a follow-up with a doctor was scheduled.
17. On September 13, 2005, the Plaintiff requested a copy of his medical records dating back to June 2003.

18. Contrary to the Plaintiff's assertions, he does not have a single cell assignment, nor is there any evidence that the Plaintiff has requested to be examined by Health Services personnel for such an assignment since his one-year single cell assignment expired.
19. Further, there is no evidence in the Plaintiff's medical records that he is suffering from "acute abdominal pain associated with a tear in the tissues of the abdominal wall", or that he has sought treatment for such an injury.
20. Similarly, with the exception of the Plaintiff's complaints and treatment for lower back pain (November 2004), there is no evidence that the Plaintiff has sought assistance from Health Services staff for "severe muscle spasms deep back and chest inclusive of the heart" or severe "sleep deprivation".
21. In conclusion, the Plaintiff has received appropriate medical care for his complaints and Health Services staff are available at the institution to provide further treatment for the Plaintiff as requested and medically indicated.

I declare that the foregoing is true and correct and is given under penalty of perjury pursuant to 28 U.S.C. § 1746.

Executed this 27th day of September 2005.

Bussanich 75

ANTHONY J. BUSSANICH, M.D.
Clinical Director
U.S.P. Lewisburg
Lewisburg, Pennsylvania 17837

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The undersigned hereby certifies that she is an employee in the Office of the United States Attorney for the Middle District of Pennsylvania and is a person of such age and discretion as to be competent to serve papers.

That on September 29, 2005, she served a copy of the attached

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by placing said copy in a postpaid envelope addressed to the person hereinafter named, at the place and address stated below, which is the last known address, and by depositing said envelope and contents in the United States Mail at Harrisburg, Pennsylvania.

Addressee:

Terrence K. Alden
Reg. No. 02595-135
USP Lewisburg
PO Box 1000
Lewisburg PA 17811

s/ Anita L. Lightner
ANITA L. LIGHTNER
Paralegal Specialist